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No. 86-637

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In the Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA AND ITS LOCALS 2100, 2101, 2108, AND 2110, PETITIONERS

v.

HARRY E. BECK, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employee of an employer subject to the National Labor Relations Act states a good federal cause of action, either for breach of the duty of fair representation or for violation of the First Amendment, by a claim that, over the employee's objection, his exclusive bargaining representative expends money collected from him under a union security provision for purposes unrelated to collective bargaining, contract administration, or grievance adjustment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, the Communications Workers of America and certain of its locals, are the exclusive bargaining representative of the employees of American Telephone and Telegraph Company (AT&T) and various of its subsidiaries (Pet. 2). Petitioners' collective bargaining agreements with AT&T contain a "union security" provision (*id.* at 3). This provision requires all employees represented by petitioners, including employees who are not union members, to pay to petitioners, as a condition of their continued employment, an "agency fee" in an "amount equal to the periodic dues" paid by union members (*ibid.*). Petitioners use the agency fees so collected to cover the costs that they incur in collective bargaining, contract administration, grievance adjustment, and, of

particular importance here, various other activities, including efforts to organize the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events (Pet. App. 75a-80a).

2. In June 1976, respondents, twenty non-union-member employees,[1] commenced this suit in federal district court against petitioners,[2] alleging that the expenditure of their agency fees for purposes unrelated to collective bargaining, contract administration, or grievance adjustment ("non-collective bargaining purposes") violated petitioners' duty of fair represention, the First Amendment, and certain common law fiduciary duties (Pet. 2-3).[3] Respondents prayed that the court declare unlawful the exaction of agency fees for non-collective bargaining purposes, enjoin petitioners from exacting agency fees for such purposes, and award respondents monetary relief for fees previously so collected and used (C.A. Supp. App. 25-27).

In March 1979, the court granted partial summary judgment to respondents (Pet. App. 135a-142a). It declared that "collect[ing] * * * amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment * * * violates the First Amendment rights of the [respondents]" (*id.* at 141a). The court enjoined petitioners from collecting in the future "amounts authorized by the agency shop clause in excess of the amount necessary for the three enumerated purposes" (*id.* at 140(a)), and ordered petitioners "to refund

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[1] A number of other employees have since joined as plaintiffs (Pet. App. 31a n.1).

[2] Respondents also named their employers and the AFL-CIO as defendants (Pet. App. 31a n.3). On motion, however, these additional defendants were dismissed from the case (*ibid.*).

[3] Jurisdiction over the duty of fair representation claim was predicated on 28 U.S.C. 1337 and 29 U.S.C. 185(a); jurisdiction over the First Amendment claim was predicated on 28 U.S.C. 1331 and 42 U.S.C. 1983; and jurisdiction over the common law fiduciary duty claim was predicated on the court's pendent jurisdiction. Pet. App. 32a; C.A. Supp. App. 4-5.

to each [respondent] for every year since January 1, 1976 an amount reflecting that portion of his dues-equivalent agency fees which was spent for [non-collective bargaining] purposes" (*id.* at 142a). The court referred the case to a special master so that appropriate refunds could be calculated (*id.* at 141a).

The special master conducted lengthy proceedings and submitted findings to the court, which adopted them on March 4, 1983, with only slight modification (Pet. App. 112a-126a). The court affirmed the master's conclusion that petitioners failed to prove by "clear and convincing evidence" that more than 21% of their funds had been expended on matters germane to collective bargaining (*id.* at 119a-121a, 123a). And it ordered petitioners to refund 79% of the agency fees that respondents had paid during the period January 1, 1976, to March 31, 1983, and to implement a recordkeeping system that would more accurately separate future collective bargaining and non-collective bargaining expenditures (*id.* at 125a, 108a-109a).

3. A divided panel of the Fourth Circuit affirmed in part, reversed in part, and remanded for further proceedings (Pet. App. 29a-83a). Noting that "[t]he complaint herein states in separate counts not merely a cause of action charging a violation of the First Amendment in the compelled payment of the dues-equivalent under threat of loss of job, but also a cause of action under section 8(a)(3) of the [National Labor Relations Act (NLRA)] * * * and related thereto, a violation by [petitioners] of their duty of fair representation" (*id.* at 45a), a majority of the panel determined that respondents should prevail on both "statutory and constitutional" grounds (*id.* at 72a). The panel majority determined, however, that use of a "clear and convincing evidence" standard in determining the proportion of petitioners' expenditures attributable to non-collective bargaining activities had been improper and that a remand was necessary so that disputed factual issues could be resolved under the appropriate evidentiary standard (*id.* at 74a-81a).

a. With respect to respondents' substantive claims, the majority began by noting that "[s]ection 8(a)(3) * * * provides permissive authority for an agreement between an employer and the exclusive bargaining representative * * * whereby employees are required to have union 'membership' as a condition of employment, subject however, to the express condition that no employer [may] discharge an employee 'for nonmembership * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership'" (Pet. App. 46a-47a, quoting 29 U.S.C. 158(a)(3)). The majority found that "[t]he legislative purpose of section 8(a)(3), as evidenced in the legislative record, was twofold: First, Congress intended the elimination of the closed shop and the substitution of the union or agency shop; second, in response to the plea of the unions that the existing statute encouraged 'free riders,' employees who enjoyed the benefits of collective bargaining but shared none of the costs of the bargaining process, it included the 'membership' provision or requirement" (Pet. App. 47a), a requirement that, the majority observed, Congress had "'whittled down to its financial core'" (*ibid.*, quoting *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963)). The majority concluded that "the extent of the objecting employee's obligation under the union or agency contract is the payment of dues, and * * * the obligation to pay dues [is], it would seem, directly related to the costs of the collective bargaining itself" (Pet. App. 48a).

The panel majority found its conclusion supported by this Court's interpretation of Section 2, Eleventh of the Railway Labor Act (RLA), 45 U.S.C. 152, a statute it characterized as "identical in language and legislative purpose" (Pet. App. 49a). The panel majority noted (*id.* at 51a) that, in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 768 (1961), the Court "held that, under section 2, Eleventh, unions [are] not vested with

'unlimited power to spend exacted money' and they might not use such money to 'support candidates for public office' or to 'advance political programs' " that contributing employees oppose. The panel majority rejected as unconvincing the distinctions that petitioners said existed between Section 2, Eleventh of the RLA and Section 8(a)(3) of the NLRA (Pet. App. 54a-60a), concluding that "the two statutes, * * * phrased similarly and expressive of the same legislative purpose, should be given the same construction" (*id.* at 56a).[4]

The panel majority also rejected petitioners' contention "that [respondents'] action, if sustainable, is within the exclusive jurisdiction of the National Labor Relations Board [(NLRB)]" (Pet. App. 60a). The panel majority ruled that "[t]he conscious use of such funds by the unions on their authority as exclusive bargaining representative under the agency contract negotiated by them with the employer is not only a violation of the statute itself but also a violation of [petitioners'] duty of fair representation" (*ibid.*). And, the majority added, because "an action for violation of the duty of fair representation is not pre-empted by the [NLRA]" (*id.* at 61a), "jurisdiction over [respondents'] statutory suit against defendant union under section 8(a)(3) and for breach

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[4] Petitioners argued, inter alia, that the Court in *Street* gave Section 2, Eleventh of the RLA a "skewed" interpretation in order to avoid a "grave" constitutional question, that Section 8(a)(3) of the NLRA does not raise the same constitutional question, and that section 2, Eleventh and Section 8(a)(3) must each be read against the statutory scheme that had existed prior to its enactment—the former against the RLA provisions prohibiting all union security arrangements, and the latter against the NLRA's allowance of all such arrangements (Pet. App. 56a-59a). The majority rejected these arguments, finding that this Court's interpretation of Section 2, Eleventh was " 'entirely reasonable' " (Pet. App. 57a (citation omitted)), that "there is no difference between a section 8(a)(3) constitutional challenge and the section 2, Eleventh challenge in *Street*" (*id.* at 58a), and that "the language of the two Acts prior to the additions of the provisions in question * * * [cannot] [a]ffect the construction to be given the later amendments" (*id.* at 59a).

of the duty of fair representation * * * properly [lies] * * * under 28 U.S.C. 1337" (*id.* at 62a).[5]

Having found that respondents had stated a good cause of action for breach of the duty of fair representation, the panel majority said that "it would seem unnecessary for us to consider the constitutional basis for jurisdiction" (Pet. App. 65a). Nevertheless, they noted (*ibid.*) that, in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), this Court had held that the authorization of the agency shop in Section 2, Eleventh of the RLA constituted governmental action sufficient to support a First Amendment claim. And, the panel majority said, since "section 2, Eleventh and section 8(a)(3) are to be given the same interpretation, then it necessarily follows under *Hanson* that there is [sufficient] governmental action here * * *" (*ibid.*); the majority reasoned that, although an "agency contract, whether under section 2, Eleventh or under section 8(a)(3), is by definition permissive" (*id.* at 66a), when an employer and union "actually * * * execute an agreement under the statute, the obligations cease to be 'permissive' and become compelled under the statute" (*id.* at 66a-67a).

b. Chief Judge Winter dissented (Pet. App. 83a-106a). As to respondents' statutory claim, he argued that "[b]oth the language of [Section] 8(a)(3) and its legislative history show that Congress did not intend to limit the use of agency shop fees under the NLRA" (*id.* at 85a), that "the history and purpose of this provision differs from the history and purpose of the agency shop provision in the [RLA]," and that the RLA's "limits on fee use should not be engrafted onto the NLRA's [Section] 8(a)(3)" (*ibid.*). And, as to respondents' First Amendment claim, he argued that the expenditure of agency fees collected pursuant to a union security agreement does not involve "state action," reasoning that the NLRA "has not compelled the establishment of unions,

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[5] Section 1337 (28 U.S.C.) provides that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce."

nor has it compelled or even encouraged the adoption of agency shop agreements * * *" (*id.* at 102a), that "[m]onopoly status, which is what the right to be the exclusive bargaining agent gives the union, is by itself insufficient to make [petitioners'] acts state action" (*id.* at 100a), and that "[t]he basis for finding government action in *Hanson*—the federal imprimatur, or mark of approval, on agency shop agreements that the Supreme Court discerned in the preemption of all contrary state law—is lacking in the NLRA" (*id.* at 103a).

4. a. On petition for rehearing, the Fourth Circuit, sitting en banc, vacated the panel decision and, by a six-to-four vote, again affirmed in part, reversed in part, and remanded for further proceedings (Pet. App. 1a-28a). In a per curiam opinion, the court indicated that five judges had "voted that federal jurisdiction 'over [respondents'] statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. 1337'" (Pet. App. 5a), though "three of these five judges * * * felt it unnecessary to consider whether jurisdiction also existed on constitutional grounds" (*ibid.*).[6] The opinion further said that "Judge Murnaghan, speaking for himself, * * * [had] found that federal jurisdiction existed in this case to decide the [respondents'] claims as violations of the union's statutory duty of fair representation, under *Vaca* v. *Sipes*, 386 U.S. 171 (1967), but * * * agreed with the dissenting panel opinion insofar as it would deny federal jurisdiction on either the statutory or the constitutional grounds" (Pet. App. 5a). Finally, the opinion indicated that all six of these judges had voted to affirm "the majority panel opinion's disposition of the allocation issue" (*id.* at 6a).

b. In his separate concurring opinion (Pet. App. 6a-22a), Judge Murnaghan, while agreeing that "governmental authority cannot be ascribed to the union here"

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[6] The other two judges "were of the opinion that jurisdiction of the cause could also be sustained on the constitutional claim" (Pet. App. 5a).

and that Section "8(a)(3) in itself [does not] prohibit unions from spending agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration" (*id.* at 8a), parted company with "Chief Judge Winter['s] assum[ption] * * * that the scope of the duty of fair representation, as it relates to the use of agency fees, is merely coextensive with the requirements of [Section] 8(a)(3)" (*id.* at 14a). Judge Murnaghan concluded that the duty of fair representation allows a union to "use the fees collected from employees only for purposes within the scope of the agency relationship" (*id.* at 17a), and that, "[w]ith respect to employees who are not members of the union," "the scope of the union's agency function * * * is confined to collective bargaining, contract administration or grievance adjustment" (*ibid.*). He therefore concluded that dissenting non-union member employees' "agency fees may be used only for those purposes" (*ibid.*).

c. Chief Judge Winter, joined by Judges Hall, Phillips, and Sprouse, dissented (Pet. App. 22a-28a). "For the reasons set forth in the dissenting panel opinion," Chief Judge Winter asserted, "the judgment of the district court should be reversed and [the court] should be directed to dismiss the complaint" (*id.* at 22a). In addition, he urged that "Judge Murnaghan's view does not withstand close scrutiny" (*id.* at 23a), reasoning that "the duty of fair representation, derived from [Section] 9 of the Act, cannot be transgressed if a union does only what Congress has intentionally refrained from prohibiting it to do" (*id.* at 24a), and that "the concurring opinion simply fails to appreciate the delicate compromise the Taft-Hartley Act managed to achieve" (*id.* at 27a).

DISCUSSION

Although the judges of the Fourth Circuit were unable to agree on a single rationale, the judgment of that court is clear: employees of an employer subject to the NLRA state a good federal cause of action by the claim that, over their objection, their exclusive bargaining representative expends agency fees collected from them under

a union security provision for non-collective bargaining purposes. This judgment, which casts the legality of collective bargaining agreements covering millions of workers into doubt, conflicts with the decisions of other courts of appeals. This Court's review is warranted.

1. There is substantial conflict among courts of appeals on the question presented. The Second Circuit has held that employees of an employer subject to the NLRA who object to the expenditure of agency fees for non-collective bargaining purposes do not have a good cause of action under either the duty of fair representation or the First Amendment. See *Price* v. *Auto Workers*, 795 F.2d 1128 (1986), petition for cert. pending, No. 86-1055. See also *Reid* v. *McDonnell Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971) (no cause of action under the First Amendment; duty of fair representation issue left open). The Ninth Circuit has held that such a claim states a good cause of action under both the duty of fair representation and the First Amendment. See *Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (1970). As petitioners note (Pet. 9), the conflict is a serious one, since the NLRA covers virtually the entire private employment sector and, in the 30 states that have not enacted right-to-work laws, over 90% of the collective bargaining agreements to which the NLRA applies contain union security provisions. The Court should use this case to resolve the conflict.

2. On the merits, we believe the Fourth Circuit erred. In our view, the employees' claim that, over their objection, petitioners expend their compulsory agency fees for non-collective bargaining purposes does not state a violation of either the duty of fair representation or the First Amendment.[7]

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[7] The en banc court below did not decide the First Amendment question. We nevertheless address it, since respondents are entitled to have the Fourth Circuit's judgment affirmed on any ground raised in that court. The views of the NLRB, however, are limited to the question whether the dues-collection challenged here would constitute an unfair labor practice under the NLRA. Chairman

a. The duty of fair representation is an implied correlative to petitioners' statutory right under Section 9(a) of the NLRA to serve as the exclusive representative for the members of the collective bargaining unit. *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 164 & n.14 (1983); *IBEW* v. *Foust*, 442 U.S. 42, 46-47 n.8 (1979); *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 64-65 (1975). The duty requires petitioners "to serve the interests of all members without hostility or discrimination toward any, to exercise [their] discretion with complete good faith and honesty, and to avoid arbitrary conduct" (*Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967)). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith" (*id.* at 190). Here, five members of the en banc majority concluded (Pet. App. 5a) that petitioners breached their duty of fair representation by using respondents' compulsory agency fees for non-collective bargaining purposes in what the court concluded was a conscious violation of Section 8(a)(3) of the statute, which is applicable to petitioners through Section 8(b)(2). See 29 U.S.C. 158(b)(2) (making it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section"). Judge Murnaghan, who cast the deciding vote, concluded (Pet. App. 5a, 7a-8a, 13a-18a) instead that, while petitioners had not violated Section 8(a)(3) and (b)(2), they had breached their duty of fair representation by so expending respondents' compulsory agency fees.[8] Neither conclusion

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Dotson and Member Johansen of the NLRB agree that certiorari should be granted, but would take no position on the substantive issues before the Court in the case.

[8] It is unclear whether the other five judges in the en banc majority adopted Judge Murnaghan's rationale as well. See Pet. App. 5a & n.2.

can stand against the language and legislative history of Section 8(a)(3).[9]

(1) Section 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" (29 U.S.C. 158(a)(3)). This proscription (and thus Section 8(b)(2)'s corollary proscription) is subject, however, to two provisos. The first proviso, which appeared in the NLRA as originally enacted in 1935 (49 Stat. 452), generally excludes union security agreements from statutory condemnation by stating that:

> nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein * * * if such labor organization is the representative of the employees as provided in section 159(a) of this title * * *.

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[9] "When an activity is arguably subject to [Section] 7 or [Section] 8 of the [NLRA]," courts ordinarily must "yield to the primary jurisdiction of the [NLRB]" (*San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959)). The federal courts may, however, decide unfair labor practice questions that "emerge as collateral issues in suits brought under independent federal remedies" (*Connell Constr. Co.* v. *Plumbers Local Union No. 100*, 421 U.S. 616, 626 (1975)). Federal courts have jurisdiction over claims that a union breached its implied duty of fair representation. *Vaca* v. *Sipes*, 386 U.S. at 188. The need to interpret Section 8(a)(3) and (b)(2) arises as a collateral issue in connection with the duty of fair representation question in this case in two ways: respondents assert a violation of these sections as proof of a violation of the duty of fair representation (see *Lewis* v. *Local No. 100 of Laborers' Int'l Union*, 750 F.2d 1368, 1375-1377 (7th Cir. 1984); see also *Teamsters Local 291*, 236 N.L.R.B. 1100, 1105 (1978)); and petitioners invoke the same provisions as a statutory defense to the duty of fair representation complaint (see *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-86 (1982)). We therefore agree that the court below had jurisdiction to interpret Sections 8(a)(3) and 8(b)(2) in deciding this case.

The second proviso, which was added in the Taft-Hartley amendments of 1947 (61 Stat. 141),[10] limits the first proviso by stating that:

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The plain language of these provisos appears to permit an employer (and hence a union) to enter into an agreement requiring all employees, including dissenters, as a condition of their continued employment, to pay uniform periodic dues and initiation fees.[11]

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[10] The Taft-Hartley Act also amended the first proviso to Section 8(a)(3) to provide that a union security agreement may not be applied to an individual until he has been employed for 30 days. See 29 U.S.C. 158(a)(3).

[11] Neither Section 7 nor Section 9(a) of the statute supports the argument that agency fees collected pursuant to a union security agreement may not be used for non-collective bargaining purposes. Section 7 provides a "right to refrain" from engaging in concerted activities, but expressly qualifies that right "to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title" (29 U.S.C. 157). And although Section 9(a) states that a "[r]epresentative[] designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes[] shall be the exclusive representative[] of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" (29 U.S.C. 159(a)), it is clear that the exclusive representative need not have collective bargaining activities as its sole purpose and that it may engage in activities not enumerated in Section 9(a). See *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 753-754 (1963) (listing non-collective bargaining activities in which exclusive representatives often engage); *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958) (noting that exclusive representative may bargain with employer concerning subjects not listed in Section 9(a)).

The provisos do not limit, or even address, the purposes to which a union may devote the fees collected pursuant to a union security provision. Nor do they give any employee, union member or not, the right to pay less than the full amount of regular dues and initiation fees charged to all other employees. To the contrary, the second proviso permits an employer to terminate any "employee," pursuant to an agreement permitted by the first proviso, if the employee fails "to tender the periodic dues and initiation fees *uniformly* required as a condition of acquiring or retaining membership" in the union (29 U.S.C. 158(a)(3) (emphasis added)).[12] The term "employee" includes any employee, non-union member as well as union member. See 29 U.S.C. 152(3). Thus, the conclusion of the five judges in the majority below—that Section 8(a)(3) (and therefore Section 8(b)(2)) prohibits petitioners from requiring respondents to pay agency fees for non-collective bargaining purposes—cannot be derived from the plain language of the statute.

Judge Murnaghan's separate argument—that compelling dissenting employees to pay agency fees that are used for non-collective bargaining purposes violates the duty of fair representation *without* violating Section 8(a)(3) (or Section 8(b)(2))—is refuted by the express language of the first proviso. That proviso states that "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making" any union security agreement allowed by Section 8(a)(3). But the duty of fair representation is an interpretive gloss on Section 9(a) of the statute (see *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. at 64-65). The first proviso to Section 8(a)(3) prevents Section 9(a) from being interpreted to preclude the negotiation or enforcement of any union security agreement allowed by Section 8(a)(3). Hence Judge Murnaghan's acknowledg-

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[12] It is undisputed that the union security agreements at issue here require only that non-union member employees pay an "agency fee" in an "amount equal to the periodic dues" paid by union member employees (Pet. 3; see also Pet. App. 31a-32a).

ment that Section 8(a)(3) does not bar the negotiation or enforcement of the agreements in question here defeats his duty of fair representation argument.

(2) The legislative history of the provisos confirms what the texts suggest: the provisos neither limit the uses to which agency fees may be put nor require dissenters to be charged less than the "uniform" fees. The first proviso was enacted in 1935 as part of Section 8(3) of the original Wagner Act. It was included to make clear that neither the NLRA nor any other federal statute would abridge the preexisting right of an NLRA employer and the representative of his employees to bargain for a closed shop or other form of union security agreement otherwise permitted by state law. See *Algoma Plywood Co.* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 301, 307, 313-314 (1949). The second proviso, together with an amendment to the first proviso (see note 10, *supra*), both of which were added in 1947 by the Taft-Hartley amendments, "abolished the closed shop" and limited "the burdens of membership upon which employment may be conditioned * * * to the payment of initiation fees and monthly dues." *NLRB* v. *General Motors Corp.*, 373 U.S. at 742. Significantly, however, during the enactment of the union security amendments to Section 8(a)(3), Congress chose, in the course of a well documented Senate-House compromise, not to place any general federal restrictions on the uses of fees so collected. See *Detroit Mailers Union No. 40*, 192 N.L.R.B. 951, 951-952 (1971). Rather, except where it expressly stated to the contrary, Congress elected to leave the regulation of the collection and use of dues and dues-equivalents through union security agreements to the states. See *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 750-754 (1963).

The union security amendments to Section 8(a)(3) originated in the Senate Committee on Labor and Public Welfare. See S. 1126, 80th Cong., 1st Sess. § 8(a)(3) (1947) *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 99, 110-111 (GPO 1948) [hereinafter *Leg. Hist.*]. That Committee,

in reviewing complaints concerning the use of union security agreements, determined that "the closed shop[,] which requires preexisting union membership as a condition of obtaining employment[,] creates too great a barrier to free employment to be longer tolerated" (S. Rep. 105, 80th Cong., 1st Sess. 6 (1947); 1 *Leg. Hist.* 412). The Committee found that the closed shop "deprives management of any real choice of the men it hires" and gives union leaders "a method of depriving employees of their jobs, and in some cases [of] a means of securing a livelihood in their trade or calling, for purely capricious reasons" (*ibid.*). It understood, however, "that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost" (*ibid.*). Thus, it agreed that unions and employers should be permitted "to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired," but proposed that they be allowed to secure an employee's discharge pursuant to such an agreement only if, inter alia, "[m]embership in the union [was] available to [the] employee on the same terms and conditions generally applicable to other members" and the worker was "delinquent in paying his initiation fee or dues" (S. Rep. 105, *supra*, at 7; 1 *Leg. Hist.* 413).[13]

Senator Taft, the chairman of the Committee and the chief sponsor of the bill, explained (93 Cong. Rec. 4876 (1947); 2 *Leg. Hist.* 1403) that the bill took a position "in the middle." On the one hand, he noted (93 Cong. Rec. 4886; 2 *Leg. Hist.* 1421), it proscribed the closed shop, because "if an employer can only employ union members, there is no freedom of labor." On the other

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[13] The Committee found this to be the most workable approach to the regulation of union security agreements, noting (S. Rep. 105, *supra*, at 20; 1 *Leg. Hist.* 426 (emphasis added)) that the litmus "tests" for determining when an employee could be discharged "are based upon facts readily ascertainable and *do not require the employer to inquire into the internal affairs of the union.*"

hand, he added (93 Cong. Rec. 3837; 2 *Leg. Hist.* 1010), the bill preserved the union shop, because "the union shop has been in force in many industries for many years, and to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure." See also 93 Cong. Rec. 4885; 2 *Leg. Hist.* 1420. Thus, Senator Taft explained (93 Cong. Rec. 4887; 2 *Leg. Hist.* 1422) that:

> the rule adopted by the committee is substantially the rule now in effect in Canada * * *. [T]he present rule in Canada is that * * * the employee must, nevertheless, pay dues, even though he does not join the union.[14]
>
> If he pays the dues without joining the union, he has the right to be employed. * * *

Senator Taft asserted (*ibid.*) that, "[u]nder the Canadian rule, and under the rule of the [C]ommittee, we pretty well take care of [the] argument" that, "if there is not a closed shop[,] those not in the union will get a free ride." And he emphasized (93 Cong. Rec. 4886; 2 *Leg. Hist* 1422) that the bill resolved the most serious abuses of the closed shop, principally by ensuring that "a man can get a job without joining the union or asking favors of the union * * *. The fact that the employee will have to pay dues to the union seems to me to be much less important."

The House was troubled by the problem of the worker who "has been compelled to contribute to causes and candidates for public office to which he [is] opposed." H.R. Rep. 245, 80th Cong., 1st Sess. 4 (1947); 1 *Leg. Hist.* 295. Accordingly, it approved a bill declaring that

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[14] The Canadian rule to which Senator Taft referred was the so-called "Rand formula," a widely known interest arbitration decision by Justice Rand of the Supreme Court of Canada. See *Ford Motor Co.*, 1 Lab. Arb. (BNA) 439 (1946). That decision denied the United Auto Worker's request for a full union shop with the Ford Motor Company of Canada, but directed a check-off of an amount equal to union dues, but not including special assessments, for all employees in the bargaining unit, including non-union members (*id.* at 445-446).

"[m]embers of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization" (H.R. 3020, 80th Cong., 1st Sess. § 7(b) (1947); 1 *Leg. Hist.* 176). The bill made it an unfair labor practice for a union "to impose any dues or general or special assessments that * * * are in excess of such reasonable amounts as the members thereof * * * shall authorize * * *," or "to fine or discriminate against any member * * * on account of his having supported or failed to support any candidate for civil office * * *" (H.R. 3020, *supra*, § 8(c)(2) and (5); 1 *Leg. Hist.* 179-180).

When the Conference Committee met to reconcile the two bills, the Senate conferees refused to accept the provisions in the House bill that proposed to regulate the "reasonableness" of union dues. Senator Taft explained (93 Cong. Rec. 6443; 2 *Leg. Hist.* 1540) that the conferees believed that:

> it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated * * *. In the opinion of the Senate conferees[,] the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection.

Senator Taft noted, however, that the Senate conferees agreed that some safeguard was needed to prevent unions from charging new members exorbitant initiation fees and thereby maintaining their monopolies over certain trades. *Ibid.* Hence, the Conference Committee added Section 8(b)(5) to the final bill, which makes it an unfair labor practice for unions to require initiation fees that the NLRB "finds excessive or discriminatory under the circumstances" (29 U.S.C. 158(b)(5)). But, even here, the Senate passed new Section 8(b)(5) only after receiving assurances from Senator Taft that it would not allow the NLRB to regulate union expenditures. Com-

pare 93 Cong. Rec. 6503; 2 *Leg. Hist.* 1579 (Sen. Murray); 93 Cong. Rec. 6514; 2 *Leg. Hist.* 1589-1590 (Sen. Pepper), with 93 Cong. Rec. 6859; 2 *Leg. Hist.* 1623 (Sen. Taft).

In striking the provisions of the House bill that would have instructed the NLRB generally to regulate the "reasonableness" of union fees or expenditures, the Conference Committee emphasized, however, that it was not affirmatively endorsing the use of union security agreements or the compelled payment of agency fees. See H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 60 (1947); 1 *Leg. Hist.* 564. It noted (*ibid.*) that "[m]any States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in these States illegal" and that "[i]t was never the intention of the [NLRA] * * * to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism." Accordingly, it added Section 14(b) to to the final bill, which as enacted states (29 U.S.C. 164 (b)) that "[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law," to make clear that the amendments to Section 8(a)(3) did not alter the states' power to regulate union security agreements, including the use of fees collected from employees pursuant to a union security agreement. See *Retail Clerks* v. *Schermerhorn*, 373 U.S. at 751.

In sum, the legislative history of Taft-Hartley cannot be reconciled with the argument that the statute—either expressly in Sections 8(a)(3) and 8(b)(2) or impliedly by way of the duty of fair representation—precludes an employer and a union from agreeing to require both union member and non-union member employees to pay uniform fees that the union may use for both collective bargaining and non-collective bargaining purposes. In 1947, Congress was principally concerned with insulating

workers' jobs from capricious actions by union leaders. Congress understood that, by eliminating the closed shop, it might create a "free rider" problem, and it therefore provided that non-union member employees may be required to pay the equivalent of union dues. But it rejected proposals to place general federal restrictions on either the dues-equivalents that employees may be required to pay or the uses to which unions may put such dues-equivalents. Rather, though it was well aware that union dues are used for "a variety of purposes in addition to meeting the union's costs of collective bargaining'" (*Retail Clerks* v. *Schermerhorn*, 373 U.S. at 754 (citation omitted)), Congress only banned unions from using union security provisions to exact more than the initiation fees and "periodic dues" uniformly required as conditions of union membership.[15] Otherwise,

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[15] In *Pattern Makers' League* v. *NLRB*, 473 U.S. 95 (1985), the Court held that the NLRB has reasonably construed Section 8(b)(1)(A) of the statute to prohibit a union from fining employees for attempting to resign from the union. The Court reasoned that Section 8(b)(1)(A), which prohibits a union from "restrain[ing] or coerc[ing] * * * employees in the exercise" of their Section 7 rights, allows unions to enforce only those membership rules that do not impair any policy embodied in the NLRA, that implicit in Section 7 and Section 8(a)(3) is a policy of "voluntary unionism," and that restrictions on the right to resign, including fines, are inconsistent with that policy of voluntary unionism. The Court rejected arguments that the text and legislative history of the Taft-Hartley amendments bar this construction of the statute, finding that restrictions on the right to resign are not "rules with respect to the acquisition or retention of membership therein," which are shielded by a proviso to Section 8(b)(1)(A), and that Congress's failure in 1947 to enact a House proposal that would have prevented unions from restricting employees' right to resign was the result of perceived legislative redundancy, not of legislative compromise. Finally, the Court held that the validity of restrictions on the right to resign must be judged against the language, legislative history, and purpose of the NLRA, and not against the common law of voluntary associations.

Pattern Makers does not support respondents' argument here. In respect of the issue in this case, the policy of voluntary unionism is expressly limited by the exceptions in Sections 7 and 8(a)(3)

it determined that the regulation of union security agreements should be left to specific federal legislation and to the legislatures and courts of the several states.[16]

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for permitted union security agreements. Moreover, Section 8(a)(3) explicitly characterizes a requirement under a union security agreement that employees submit "periodic dues" as a rule "with respect to the acquisition or retention of membership." Furthermore, Congress's decision in 1947 not to impose limits on the dues that may be exacted through a union security agreement, or the uses to which those dues may be put, was, as shown in text, the result of a well-documented Senate-House compromise. Finally, with the exception of a few specific federal limitations, the NLRA generally makes the validity of union security agreements a matter of state common (and statutory) law. Thus, whereas the NLRB's position in *Pattern Makers* was firmly anchored in the statute, respondents' position here is not. See also *NLRB* v. *Boeing*, 412 U.S. 67 (1973) (Section 8(b)(1)(A) cannot reasonably be construed to authorize the NLRB to determine whether the amount of a disciplinary fine imposed by a union against one of its members is reasonable).

[16] Congress has, of course, imposed several specific limits on the collection and expenditure of fees and dues exacted from bargaining unit employees. In Section 304 of the Labor-Management Relations (Taft-Hartley) Act, 1947, ch. 120, 61 Stat. 159-160, which is now incorporated in the Federal Election Campaign Act (see 2 U.S.C. 441b), Congress made it unlawful for a union "to make a contribution or expenditure in connection with" any political election, primary, or political convention. In Section 101(a)(3) and Section 501(a) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411(a)(3), 501(a)), Congress established procedures to be followed in setting periodic dues and imposed fiduciary obligations or union officers in the expenditures of funds so collected. In Section 19 of the NLRA (29 U.S.C. 169), added to the statute in 1980, Congress exempted members of conscientiously objecting religious groups from joining or financially supporting any labor organization as a condition of employment, except that, where a union security agreement is in force, such employees may be required "in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 * * *." We also note that approximately twenty states have in fact imposed some sort of limits on the union security agreements that are permitted in their jurisdictions. See 2 C. Morris, *The Developing Labor Law* 1391-1392 (2d ed. 1983).

(4) The text of Section 8(a)(3) of the NLRA is, of course, quite similar to the text of Section 2, Eleventh of the RLA (45 U.S.C. 152).[17] This Court, in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961), interpreted Section 2, Eleventh to preclude the use of monies collected from nonmembers pursuant to a union security clause for non-collective bargaining purposes. See also *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984). But, as Chief Judge Winter stated in his panel dissent (Pet. App. 91a-97a), the premises on which the *Street* Court rested its interpretation of Section 2, Eleventh are missing in the context of the NLRA.

First, in interpreting Section 2, Eleventh, the *Street* Court perceived (367 U.S. at 749-750) that it was acting in the shadow of a serious First Amendment question. The *Street* Court read (*id.* at 749) the decision in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), to establish that, because the RLA preempts state right-to-work laws, the negotiation and implementation of union security agreements in the railway industry involves "governmental action" subject to constitutional restraints. See also *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977). As explained below (see pages 24-30, *infra*),

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[17] Section 2, Eleventh of the RLA (45 U.S.C. 152) provides, in pertinent part, that:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
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> (a) to make agreements, requiring, as a condition of continued employment, that * * * all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment * * * with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

we see no comparable First Amendment question in the context of the NLRA. Section 14(b) of the NLRA expressly provides that the NLRA does *not* preempt state law, and thus union security arrangements permitted by Section 8(a)(3) may nevertheless be prohibited by the states; and there is no other basis for finding that the negotiation and implementation of a union security agreement containing terms permitted by Section 8(a)(3) involves "state action."

Second, the *Street* Court's interpretation of Section 2, Eleventh was influenced by the "open shop" history of the railway industry (see 367 U.S. at 766-770). The *Street* Court found (*id.* at 750-751 (emphasis in original; footnote omitted)) that:

> The history of union security in the railway industry is marked *first*, by a strong and long-standing tradition of voluntary unionism on the part of the standard rail unions; *second*, by the declaration in 1934 of a congressional policy of complete freedom of choice of employees to join or not to join a union; [and] *third*, by the modification of the first legislative policy against compulsion, but only as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act.

In industries covered by the NLRA, the history of union security agreements was quite different. Prior to 1947, employers and unions had long included union security provisions in their collective agreements; indeed, from 1935-1947, Congress expressly permitted all forms of union security not invalid under applicable state law, included the closed shop. Congress in 1947 attempted to remedy the most serious abuses of the closed shop, but to read the legislation adopted in 1947 as also prohibiting the forced exaction of agency fees that may be used for non-collective bargaining purposes is to suggest that the 1947 legislation made a more dramatic change than the evidence will support. See *NLRB* v. *General Motors Corp.*, 373 U.S. at 738-744; *Retail Clerks* v. *Schermerhorn*, 373 U.S. at 750-754. Thus, the historical considera-

tions that underlay the *Street* decision point in a quite different direction than does the history of the NLRA.

Finally, dissenting employees in industries covered by the NLRA do have various means, unavailable to their counterparts under the RLA, for challenging their exclusive representative's use of their compelled agency fees. First, unlike the RLA, the NLRA, in Section 14(b), expressly reserves to the states the right to regulate union security agreements. See 29 U.S.C. 164(b). Dissenting employees may well have rights under common or statutory law of the state in which they work to prevent the exaction of fees for non-collective bargaining purposes. See generally *Oil Workers* v. *Mobil Oil Corp.*, 426 U.S. 407, 416-417 (1976); *id.* at 424-427 (Stewart, J., dissenting). Second, in contrast to the RLA, the NLRA does not allow an employer and a union to condition employment on the payment of uniform special "assessments" —as opposed to "periodic dues"—to the union. See *NLRB* v. *Food Fair Stores*, 307 F.2d 3, 9-16 (3d Cir. 1962); *International Harvester Co.*, 95 N.L.R.B. 730 (1951). One factor that the NLRB considers in distinguishing between "assessments" and "periodic dues" is the purpose for which the union has collected the funds in issue. See *Detroit Mailers Union No. 40*, 192 N.L.R.B. at 952; *Local 959, Teamsters (RCA Service Co.)*, 167 N.L.R.B. 1042, 1044-1045 (1967). Thus, at least some forced exactions may—in part because of the particular non-collective bargaining purposes for which they are used—not be "periodic dues" at all. See, *e.g.*, *Welsbach Elec. Corp.*, 236 N.L.R.B. 503 (1978) (regular exaction to support loan fund for unemployed workers is unlawful "assessment"); *Local 959, Teamsters (RCA Service Co.)*, 167 N.L.R.B. 1042 (1967) (levy designed to support union's credit union and building programs is an "assessment").[18]

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[18] There are also, of course, kinds of conduct involving the expenditure of dues that would violate the NLRA. A union would breach its duty of fair representation if it spent such funds with an arbitrary, discriminatory, or bad faith purpose—*e.g.*, with the intent of driving the employee out of the work force or bargaining

b. Nor do we believe that respondents state a good cause of action for violation of the First Amendment by the claim that, over their objection, petitioners expend their compulsory agency fees for non-collective bargaining purposes. Essential to any First Amendment claim is a finding that the conduct challenged constitutes "state action." *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976). State action, however, may be said to exist only when "the conduct allegedly causing the deprivation of a federal right [may] be fairly attributable to the State" (*Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). No such attribution is possible here.

All conduct leading to the expenditure of agency fees secured through a union security agreement on non-collective bargaining matters is a consequence of private choice and initiative. Employees form unions on their own initiative. Unions are not instructed or encouraged (but merely permitted) to seek union security agreements that provide for the collection of agency fees. And the government plays no general role in determining how funds collected pursuant to a union security agreement are spent. Employers and unions established all types of union security agreements—closed shops, union shops, and agency shops—before the NLRA was enacted. No

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unit. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976). Likewise, a union would violate Section 8(b)(1)(A) of the statute if it attempted to secure the discharge of an employee who refused to support illegal activities of the union. *See Scofield* v. *NLRB*, 394 U.S. 423, 429 (1969). And it may be that the provisos to Section 8(a)(3) (and thus to Section 8(b)(2)) would not allow an employer and union to agree to condition employees' job rights on the financial support of activities that are found to be wholly outside of the scope of Section 7's guarantees, because, for example, they have no relationship at all to employees' interests and concerns as employees. See *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 567-568, 570 n.20 (1978); *Ford Motor Co.*, 221 N.L.R.B. 663, 666 (1975); cf. Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61, 75 (1983) (suggesting that the statute permits the NLRB and the courts to prohibit a union from expending compelled fees for purposes that cannot "reasonably be said to be aimed at producing job-related benefits"). Respondents do not appear to have advanced any such claims in this case.

governmental action was involved or required then; no governmental action is involved or required now.

Under this Court's precedents, the fact that the NLRA excludes union security agreements from statutory condemnation, while making other employer and union conduct unlawful, is not a sufficient basis for treating either those agreements or the expenditure of funds collected pursuant thereto as acts involving "government action." The "exercise of the choice allowed by * * * law[,] where the initiative comes from [a private party] and not from the State, does not make its action in doing so 'state action' * * *" (*Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974)). See also *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 160 n.10, 164-166 (1978); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841-842 (1982); *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). Rather, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State" (*ibid.*). No such coercion or significant encouragement exists here.[19]

Nor does the fact that the NLRA confers "exclusive" status on the bargaining representative selected in accordance with the Act's provisions mean that the negotiation of a permitted union security agreement or the expenditure of the agency fees collected pursuant thereto

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[19] This case does not involve court or NLRB action to compel an employer or union to comply with its union security agreement. Nevertheless, we note that such compulsion would not add the required element of governmental action. See *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298-299 (1956). Although the Court has found the Fourteenth Amendment offended by the governmental activity of enforcing racially discriminatory covenants in housing subdivisions (see *Shelley* v. *Kraemer*, 334 U.S. 1 (1948)), there are large numbers of private contracts that restrict speech or association in ways that would not be permissible for government, but such contracts are not therefore unenforceable. See generally *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 939 n.21, 942 (1982); *Evans* v. *Abney*, 396 U.S. 435, 445-447 (1970).

involves governmental action. This Court has long held that the mere exercise of a statutorily conferred cartel power, without more, does not constitute "state action." See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 351-352; *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172-177 (1972); cf. *Blum* v. *Yaretsky*, 457 U.S. at 1003-1012 (employment decisions of private entity are not rendered "governmental acts" by virtue of the state's extensive regulation and subsidization of that entity); *Rendell-Baker* v. *Kohn*, 457 U.S. at 840-842 (same). Thus, while the Court has compared the acts of an exclusive representative to the acts of a governmental body (see, *e.g.*, *NLRB* v. *Allis-Chalmers Mfg.*, 388 U.S. 175, 180 (1967)), it has also twice refused to find that acts of a union in an industry governed by the NLRA are subject to constitutional restraints. See *United Steelworkers* v. *Weber*, 443 U.S. 193, 200 (1979); *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 121 n.16 (1982). We see no persuasive reason for treating union security agreements differently.

c. Although we think it clear that, under the main line of "state action" doctrine, there is no state action here, the Court's agency fee cases under the RLA do give us serious pause. As in the NLRA context, employees in the railroad and airline industries form unions on their own initiative. Those unions seek to establish union security agreements without instruction or encouragement by the state. And the state plays no role in determining how the funds collected pursuant to a union security agreement will be spent. Nevertheless, the Court has said that there is "governmental action" involved in the negotiation and implementation of RLA agency fee agreements. See *Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 231-232; *Machinists* v. *Street*, 367 U.S. at 749-750; *Ellis* v. *Ry. Clerks*, 466 U.S. at 455-457. It is not easy to distinguish these RLA cases from the present case.

The Court's conclusion that "government action" was involved in the RLA cases was said, in the opinions in those cases, to rest on a factor that is not present here:

the RLA's preemption of contrary state right-to-work laws. By preempting state right-to-work laws, the RLA legalizes otherwise unlawful private action and is thus said to give union security agreements the imprimatur of federal law. See *Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 232; see also *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 218 n.12. In candor, we do not find the presence of preemption a satisfactory basis either for distinguishing the RLA cases from the present case or for finding governmental action in the first place. There are many situations in which federal law ousts contrary state law and permits private conduct, yet to our knowledge the Court has never intimated (except in *Hanson*) that such conduct becomes governmental by virtue of the operation of the Supremacy Clause. Indeed, at least one respected commentator has suggested that the operation of the Supremacy Clause is not an appropriate basis for finding "governmental action," reasoning that the Supremacy Clause was fashioned to cope with problems entirely unrelated to the question of when constitutional restraints should apply to private actions, and that using it to make "state action" distinctions will unduly limit the sphere of private action subject only to legislative restraint. See Wellington, *The Constitution, The Labor Union, and "Governmental Action"*, 70 Yale L.J. 345, 355-357, 361-371 (1961). Thus, while the NLRA's preservation of state right-to-work laws is an obvious basis for distinction, we find it an unsatisfactory one, and therefore are concerned that we have misunderstood the Court's rationale for finding "state action" in the RLA cases.

In particular, the line of cases from *Hanson* to *Ellis*, while dealing only with RLA employers and public employers, obviously reflects a more general concern about conditioning something as significant as employment on the compromise of interests in expression and association. The Court has noted in the RLA context that it is said that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and free-

dom of thought * * *'" (*Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 236). The Court has expressed concern in the public employer context that requiring nonunion employees to help finance the union as a collective bargaining agent may well be thought "to 'interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit'" (*Chicago Teachers Union Local No. 1* v. *Hudson*, No. 84-1503 (Mar. 4, 1986), slip op. 8 (quoting *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977)). And it has at least been intimated, in the RLA and public employer cases, that requiring an individual, as a condition of employment, to finance non-collective bargaining causes with which he disagrees may be so inherently at odds with First Amendment values that even the government's express *permission* to an exclusive bargaining representative to impose such requirements may constitute "governmental action." See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 226-227; *Machinists* v *Street*, 367 U.S. at 777 & n.3 (Douglas, J., concurring); *Lewis* v. *American Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1094-1095 (1974) (Douglas, J., dissenting); cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).[20]

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[20] The Court has, of course, also acknowledged Congress's judgment that, by preventing free-riders, union security agreements contribute to industrial peace and labor-management stability (see *Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 233-235) and has held that a nonunion employee may be required both to accept the terms and conditions of employment negotiated by an exclusive representative and to pay a fair share of that representative's collective bargaining costs (see *Ellis* v. *Ry. Clerks*, 466 U.S. at 455-456). The Court has said that, where there is sufficient state action to implicate constitutional limitations, the free-rider rationale justifies compelling financial support only for collective bargaining purposes. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 221-223, 232-237; *Machinists* v. *Street*, 367 U.S. at 761-764. Dissenting justices, by contrast, have contended that unions must engage in non-collective bargaining activities to represent adequately workers' interests and that the free-rider rationale thus applies to expenditures for those purposes as well. See *id.* at 811-816 (Frankfurter, J., dissenting).

This is a path down which, in our view, the Court should not travel any further. Congress often adopts a "hands-off" policy to private conduct which, if undertaken by the government itself, might be constitutionally offensive. This "hands-off" policy, when adopted, reflects Congress's judgment either that such conduct is inoffensive when only private persons are involved or (as Congress clearly decided on the present issue when it enacted Taft-Hartley) that the benefits of coercive intervention by government are outweighed by the benefits of preserving the freedom of private actors. Treating Congress's decision *not* to prohibit particular conduct as a basis for finding "governmental action" would both usurp this legislative judgment and subject private actors to constitutional restraints that are not designed to restrain them at all. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 349; *Lugar* v. *Edmondson Oil Co.*, 457 U.S. at 936-937; see generally Wellington, *supra*, 70 Yale L.J. at 361-371. This Court has accordingly stated that "[i]t would intolerably broaden * * * the notion of state action * * * to hold that the mere existence of a body of * * * law * * *, whether decisional or statutory, itself amounts to 'state action'[,] even though no state process or state officials were ever involved in enforcing that body of law." *Flagg Bros.* v. *Brooks*, 436 U.S. at 160 n.10; see also *id.* at 164-166.

An extension of "state action" doctrine to reach Congress's decision *not* to forbid agency shop agreements and *not* to restrict unions' use of their proceeds would be inconsistent with cases finding no state action in contexts that are not easy to distinguish. For example, a union-negotiated no-strike clause or no-solicitation rule also limits expressive activity, but the Court has properly declined to find "state action" in those contexts. See *Steelworkers* v. *Sadlowski*, 457 U.S. at 121 n.16 (union's rule prohibiting candidates for union office from accepting contributions from non-members is not "state action"); cf. *Boys Mkts., Inc.* v. *Retail Clerks*, 398 U.S. 235 (1970) (federal court may enjoin strike and picketing activity undertaken in violation of no-strike and ar-

bitrability clauses of collective bargaining agreement). Statutorily sanctioned union activity also affects other interests that have a constitutional dimension, such as the rights to equal treatment without regard to race or gender, and to procedural due process; but again, the Court has found that union activity touching these interests did not involve state action. See *Steelworkers* v. *Weber*, 443 U.S. at 200 (collectively bargained affirmative action plan does not constitute state action). Nor is it easy to distinguish between unions and other entities whose existence or power is partially due to statute, but the Court has routinely held that, for example, public utilities, broadcasters, licensed professionals and other entities are not "state actors" by virtue of their state charters or licenses. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 349 (public utility); *Columbia Broadcasting Sys.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 114-121 (1973) (plurality opinion) (licensed broadcasters).[21] We believe that the Court spoke wisely when it said that "[c]areful adherence to the 'state action' requirement" is vital so as to "preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power" (*Lugar* v. *Edmondson Oil Co.*, 457 U.S. at 936), and therefore that the Court should decline to find state action in connection with union security agreements in the NLRA context.[22]

[21] There have, of course, been suggestions for an enlargement of the concept of state action to include state-chartered entities. See Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933 (1952).

[22] After the Court invited the Solicitor General to express the views of the United States, respondents filed a cross-petition for certiorari in this case. See *Beck* v. *CWA*, No. 86-966 (filed Dec. 11, 1986). The cross-petition raises various questions concerning the adequacy of the remedy provided by the district court and approved by the court of appeals. We suggest that the Court hold the cross-petition pending the resolution of the question presented by the petition. If the Court agrees with our resolution of the merits of that question, the cross-petition will become moot. If the Court disagrees with our resolution of the merits, it can then determine whether the questions raised by cross-petition are independently worthy of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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